

FEDERAL ELECTION COMMISSION 2013 JUL -1 PM 3:49  
999 E Street, N.W.  
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6703  
DATE COMPLAINT FILED: 12/5/2012  
DATE OF NOTIFICATION: 12/11/2012  
LAST RESPONSE RECEIVED: 1/30/2013  
DATE ACTIVATED: 4/9/2013

EXPIRATION OF SOL:  
October 25, 2017 (earliest)  
October 25, 2017 (latest)  
ELECTION CYCLE: 2012

COMPLAINANT: Daniel Fishman

RESPONDENTS: WCVB-TV, Channel 5 ("WCVB")  
Hearst Stations, Inc.

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 441b(a)  
11 C.F.R. § 100.92  
11 C.F.R. § 100.154  
11 C.F.R. § 110.13(a)-(c)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Complainant was the 2012 Libertarian candidate for Congress in Massachusetts's Sixth Congressional District. *See* Resp. at 1 (Feb. 1, 2013). WCVB, a broadcast station based in Boston, sponsored a televised debate of candidates in that election on October 25, 2012. The Complainant alleges that he was unlawfully excluded by WCVB from the debate based on selection criteria that were not pre-established and objective, as required by 11 C.F.R. § 110.13. Compl. at 2-3 (Dec. 5, 2012). Respondents deny those allegations and in support provide

1 declarations from WCVB's news director Andrew Vrees and senior producer Rosemary Lappin.  
2 For the reasons stated below, we recommend that the Commission find no reason to believe that  
3 Respondents violated 2 U.S.C. § 441b(a) in connection with the debate.

## 4 II. FACTS

5 Complainant was a registered candidate in the 2012 election in Massachusetts's Sixth  
6 Congressional District. *See* Daniel Fishman Statement of Candidacy (July 3, 2012); Compl. at 2.  
7 WCVB is a television station owned by Hearst Stations, Inc. Resp. at 2.

8 In September or early October 2012, WCVB began planning to host a debate between  
9 Congressional candidates in the sixth district on its regularly scheduled public affairs program  
10 "On the Record." Rosemary Lappin Decl. at 1 (Jan. 30, 2013); Andrew Vrees Decl. at 1 (Jan.  
11 29, 2013). Vrees avers that, in preparing for the debate, he researched objective written criteria  
12 WCVB had used previously for the 2010 Senate debate and for the 2010 gubernatorial debate.  
13 He further avers that he discussed these criteria with Rosemary Lappin, and they agreed to use  
14 them as a "base, or a guide to formalize the objective criteria for the October 25, 2012, debate."  
15 Vrees Decl. at 2 and Vrees, Ex. A (previous criteria); *see also* Lappin Decl. at 1-2.

16 In an October 11, 2012, e-mail, Lappin informed each of the three candidates in the Sixth  
17 Congressional District election, including Complainant, that WCVB's "On the Record" show  
18 would host a half-hour candidate debate on October 25, 2012. Compl. at 1; Lappin Decl. at 2,  
19 Ex. A (e-mails). Lappin's e-mail listed the following criteria for participation: (1) at least three  
20 campaign staff; (2) daily campaign schedule; (3) regular communication with news media; (4)  
21 campaign contributions of at least \$50,000; and (5) a showing of at least 10% in two of the latest  
22 independent polls. Lappin Decl., Ex. A. The e-mail also stated that "[a] candidate must fulfill  
23 all these requirements to participate." *Id.*

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1 Complainant responded to Lappin's e-mail later the same day, stating in part, "before I go  
2 public with my rebuttal, I just want to make clear that you are deliberately not inviting a  
3 campaign that is gaining traction every day." *Id.* Lappin responded by e-mail the next day: "I  
4 understand that you feel your campaign is gaining traction. WCVB-TV has set the 6th  
5 Congressional Debate criteria. On behalf of Channel 5 management and myself, if you meet  
6 them all by Monday, October 22 you will be included." *Id.* Lappin states that she investigated  
7 whether the candidates met each of the criteria, determined that Complainant failed to meet most,  
8 if not all, of them, and did not receive any information from Complainant between October 11  
9 and 22, 2012, regarding his ability to meet them. On or about October 22, 2012, Lappin notified  
10 Complainant that he did not meet several of the criteria and therefore was not eligible to  
11 participate in the October 25, 2012, debate. Lappin Decl. at 3.

12 Complainant argues that two weeks' notice does not constitute pre-established criteria,  
13 and that "the requirements seem tailor made to exclude my campaign, which makes them not  
14 objective." Compl. at 2. Complainant also specifically challenges three participation criteria.  
15 First, he states that the polling criteria was impossible to achieve because at the time of the  
16 October 11, 2012, e-mail announcing the criteria, there were not already two independent polls  
17 showing support for his candidacy of at least 10%.<sup>1</sup> *Id.* Complainant maintains that his

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<sup>1</sup> The Complaint actually states, "there had not been two independent polls indicating my support at *less than* 10%, so the criteria was impossible to achieve." Compl. at 2 (emphasis added). Taking the statement in context, we believe that Complainant meant to refer to polls indicating support of *at least* 10 percent.

1 internal polling indicated his support at over 10%, and polls that excluded him showed well over  
2 30% of the voters undecided.<sup>2</sup> *Id.*

3 Second, Complainant alleges that the \$50,000 in contributions criterion was not objective  
4 because “[t]here is no evidence that \$50,000 is a number that indicates a competitive campaign,”  
5 and “[w]ith modern citizen based journalism, Social Media and Youtube, the opinion that a  
6 campaign MUST raise cash above and beyond the FEC’s requirements for official candidacy  
7 status is not objective.” *Id.* He maintains that before WCVB created its debate criteria, “which  
8 seem[] designed to exclude my campaign,” he was on the public record stating that he wanted to  
9 rely mostly on volunteer spending and would not accept corporate contributions, making it easy  
10 for WCVB to “pick a criteria my campaign had announced it was unwilling to meet.” *Id.* at 2-3.  
11 Although he admits he did not raise enough funds to satisfy the criterion, Complainant states that  
12 he could have contributed \$50,000 to his campaign, “but I saw that as a betrayal [of] the  
13 principles I was running on.” *Id.* at 3.

14 Finally, Complainant alleges that the criterion of “‘regular communication’ with the news  
15 media is such a vague description that it lends itself to being used in a discriminatory manner.”  
16 *Id.* He states that his campaign issued regular press releases, had discussions with editors of the  
17 major papers in the Sixth District, conducted numerous television interviews, and that he had  
18 participated in debates with the other candidates in the election. *Id.* Complainant concludes by  
19 stating that he thinks this matter is “very similar to *La Botz v. FEC* [889 F. Supp. 2d 51 (D.D.C.  
20 2012)]” (“*La Batz*”). *Id.*

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<sup>2</sup> According to her declaration, Lappin consulted a *Boston Globe* poll taken on October 1, 2012, and a WBUR poll taken September 12, 2012. Lappin, Decl. at 3. Among likely voters, the *Boston Globe* poll showed support of 37% for Richard Tisei, 31% for John Tierney, 2% for other, and 30% undecided. [http://www.boston.com/multimedia/2012/10/01/poll/poll\\_web\\_monday\\_final.pdf](http://www.boston.com/multimedia/2012/10/01/poll/poll_web_monday_final.pdf). The WBUR poll showed voters' initial preferences to be 39% for Tierney, 32% for Tisei, and 6% for Complainant. [http://www.wbur.org/files/2012/09/0912\\_6th-topline-results.pdf](http://www.wbur.org/files/2012/09/0912_6th-topline-results.pdf). See Exhibit B to Lappin Decl. (spreadsheet showing part of Lappin's research).

1 Respondents contend the debate participation criteria were both pre-established and  
2 objective, that Complainant did not meet them, that the criteria were not designed to exclude  
3 Complainant, and that this matter is not akin to *La Botz*. Resp. at 5-9.

### 4 III. LEGAL ANALYSIS

5 Corporations may not make contributions to federal candidates, 2 U.S.C. § 441b(a), but  
6 funds used or provided "to defray costs incurred in staging candidate debates in accordance with  
7 the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)" are not considered contributions.  
8 11 C.F.R. § 100.92. "Broadcasters (including a cable television operator, programmer  
9 or producer), *bona fide* newspapers, magazines and other periodical publications" are among the  
10 "staging organizations" specifically permitted to stage candidate debates, provided that they are  
11 not owned or controlled by a political party, political committee or candidate. 11 C.F.R.  
12 § 110.13(a)(2).

13 WCVB is a broadcaster owned by Hearst Stations, Inc., and neither entity is owned or  
14 controlled by a political party, political committee, or candidate, *see* Resp. at 4, and therefore  
15 WCVB qualifies as a debate staging organization pursuant to 11 C.F.R. § 110.13(a). The debate  
16 regulations leave the structure of the debate to the discretion of the staging organization,  
17 provided that the debate includes at least two candidates, and the organization does not structure  
18 the debates to promote or advance one candidate over another. *See* 11 C.F.R. § 110.13(b).  
19 Further, the staging organization must use pre-established objective criteria to determine which  
20 candidates may participate in a debate. *See* 11 C.F.R. § 110.13(c).

21 WCVB's October 25, 2012, debate included two candidates, and there is no indication  
22 that WCVB arranged the debate in a manner that promoted or advanced one candidate over  
23 another. The sole issue in this matter is whether WCVB used pre-established objective criteria  
24 as a basis for excluding Complainant from the debate. The record in this matter supports the

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1 conclusion that the selection criteria used by WCVB were both pre-established and objective,  
2 and thus complied with the applicable regulations.

3 To establish that the criteria were pre-established, the Commission has stated that,  
4 "[s]taging organizations must be able to show that their objective criteria were used to pick the  
5 participants, and that the criteria were not designed to result in the selection of certain pre-chosen  
6 participants." Corporate and Labor Organization Activity; Express Advocacy and Coordination  
7 with Candidates, 60 Fed. Reg. 64,259, 64,262 (Dec. 14, 1995). Reducing the objective criteria to  
8 writing is "well advised." *Id.* Similarly, to qualify as "objective," the criteria need not "be  
9 stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it  
10 appears that they must be free of 'content bias,' and not geared to the 'selection of certain pre-  
11 chosen participants.'" *See* First Gen. Counsel's Rpt. at 23, MURs 4956, 4962, 4963 (Union  
12 Leader Corp., *et al.*).

13 WCVB's debate criteria are, on their face, free of any content-bias designed to exclude  
14 any particular candidate. According to Vrees's declaration, "[i]t was important, from a  
15 newsgathering and public interest perspective, for [WCVB] to focus its limited airtime on the  
16 candidates whose campaigns had generated a sufficient level of interest and support among  
17 voters and in the media. The criteria we used provided an objective benchmark for us to make  
18 that determination." Vrees Decl. at 2. There is no information showing that WCVB was  
19 influenced by any other considerations or, more specifically, that it chose the criteria with the  
20 intent to exclude Complainant from the debate. Indeed, Lappin told Complainant that he could  
21 have until October 22, 2012, eleven days from the notification and three days before the debate,  
22 to show he met the requirements. Lappin Decl., Ex. A.

23 Requiring a showing of 10% in two recent independent polls for participation in the  
24 debate is both objective and reasonable. *See Buchanan v. FEC*, 112 F. Supp. 2d. 58, 73-75

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1 (D.D.C. 2000) (finding that the use of 15% showing of support in independent poll was objective  
2 and reasonable). The criterion is consistent with seeking debate participants whose campaigns  
3 have generated a modest measure of voter interest and support, not evidence that WCVB  
4 intentionally excluded Complainant. There is no dispute that Complainant failed to satisfy this  
5 criterion. *See supra* p. 4 n. 2. Likewise, the \$50,000 contribution criterion is an objective and  
6 reasonable benchmark of voter support. Complainant's decisions to run a campaign based  
7 mostly on volunteer spending and to refuse all corporate contributions (which are prohibited,  
8 anyway) do not indicate that WCVB chose the \$50,000 threshold to exclude him rather than as a  
9 means to select participants whose campaigns had garnered a level of financial support  
10 demonstrating significant voter interest. There is no dispute that Complainant did not meet this  
11 criterion.<sup>3</sup>

12 WCVB's debate criteria are also consistent with Commission-approved objective criteria  
13 specified in previous matters, which include the candidate's fundraising ability, standing in the  
14 polls, and the level of campaign activity by the candidate: *See* MURs 4956, 4962, and 4963  
15 (Union Leader Corporation, *et al.*) (significant candidate and campaign organization presence);  
16 MUR 5395 (Dow Jones, *et al.*) (active campaigning, ability to fundraise, and standing in public  
17 polls); and MUR 5650 (University of Arizona) (level of campaign activity and significant voter  
18 interest). *See also* *La Botz*, 889 F. Supp. 2d at 63-64; *Buchanan*, 112 F. Supp. 2d. at 74  
19 (concluding that polling data is objective); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S.  
20 666, 682 (1998) (citing lack of financial support as an objective indicator). In addition,  
21 Respondents have presented evidence that the criteria used here were based on, or guided by

<sup>3</sup> The Committee to Elect Dan Fishman's ("Fishman Committee") 2012 October Quarterly Report, filed October 16, 2012, shows only \$8,241.90 in total contributions, including \$6,057.58 from the candidate. The Fishman Committee's 2012 Pre-General Report, filed on November 2, 2012, shows only \$50 in contributions for the election cycle to date. The Fishman Committee did not file 2012 Pre-General and Year-End Reports. The Commission administratively terminated the Fishman Committee, effective in May 2013.

1 written criteria used in two previous debates; this further refutes the allegation that the criteria  
2 were specifically designed to exclude any particular candidate in this election. *See* Lappin Decl.  
3 at 1-2; Vrees Decl. at 2 and Ex. B.

4 Complainant alleges that the criterion of regular communication with the news media is  
5 so vague that it lends itself to being applied in a discriminatory manner. Compl. at 3. While this  
6 criterion appears to be both qualitative and quantitative, the criterion itself is not content-based,  
7 was pre-established in writing, and there is no information that WCVB intended it to exclude  
8 Complainant rather than to include participants that the news media considered to be of interest  
9 to its audiences.<sup>4</sup> Accordingly, Respondents' debate criteria were both objective and pre-  
10 established within the meaning of the Commission's debate regulations.

11 Contrary to Complainant's assertion, this matter is not similar to *La Botz*. In that case, a  
12 district court remanded a complaint to the Commission that alleged that the Ohio News  
13 Organization ("Ohio News") and its member newspapers improperly excluded the complainant  
14 from three televised debates. The district court concluded that there was insufficient evidence  
15 that Ohio News used pre-established criteria to select debate participants, and there was evidence  
16 that Ohio News used major party affiliation as the sole criterion. Here, in contrast to *La Botz*,  
17 Respondents submitted declarations showing that WCVB relied on previously written objective  
18 criteria and provided its criteria to Complainant and the other candidates in writing in advance of  
19 the debate. There is no indication that WCVB used major party affiliation as a criterion, and the  
20 declarations of WCVB's Vrees and Lappin were based on first-hand knowledge, were consistent  
21 with each other, and were supported by contemporaneous documentary evidence.

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<sup>4</sup> Respondents acknowledge that there is a dispute as to whether Complainant met that criterion. Resp. at 6. Even if the dispute were settled in Complainant's favor, however, he still would not have been eligible to participate in the debate since he admittedly failed to meet the other criteria.

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Based on the above, we recommend that the Commission find no reason to believe that WCVB-TV, Channel 5 and Hearst Stations, Inc. violated 2 U.S.C. § 441b(a), and close the file.<sup>5</sup>

#### IV. RECOMMENDATIONS

1. Find no reason to believe that WCVB-TV, Channel 5 and Hearst Stations, Inc. made corporate contributions in violation of 2 U.S.C. § 441b.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Anthony Herman  
General Counsel

7-1-13  
Date

BY: Kathleen Guith  
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<sup>5</sup> Since Complainant challenged the Respondents' debate criteria pursuant to 11 C.F.R. § 110.13, we analyzed whether the Respondents satisfied the requirements of the debate exemption. In addition to maintaining that the October 25, 2012, debate fell within the debate exemption, Respondents also assert that it fell within the media exemption at 2 U.S.C. § 431(9)(B)(i), which excludes the cost of any "news story, commentary, or editorial distributed through the facilities of any broadcasting station" from the definition of "contribution" or "expenditure" where the entity is not owned or operated by a political committee and is operating within its "legitimate press function." See Resp. at 3-4; see also *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). Because we concluded that the debate exemption applied, we did not also analyze the applicability of the media exemption.